

1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

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2 MEDTECH PRODUCTS, INC.,

3
3 Plaintiff,

4
4 v.

07 Civ. 3302(KMK)(LMS)

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6 RANIR, LLC and CVS PHARMACY, INC.,

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7 Defendants.

7 -----x
8 MEDTECH PRODUCTS, INC.,

8 Plaintiff,

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9 v.

10 DENTEK ORAL CARE, INC.,

11 Defendant.

11 -----x
12 MEDTECH PRODUCTS, INC.,

12 Plaintiff,

13
13 v.

14 POWER PRODUCTS, INC., d/b/a SPLINTEK,

15 Defendant.

15 -----x

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18 United States Courthouse
18 White Plains, N.Y.
19 October 30, 2007
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22 Before:

22 THE HONORABLE LISA MARGARET SMITH,

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23 Magistrate Judge
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1 And, finally, with regard to DenTek, what we are
2 proposing is to get production, once we now have a protective
3 order entered, within the week, a subset of documents as
4 described in our letter specifically relating to Ms. Kaplan,
5 Mr. Duane or relating to the DenTek dental protector that are
6 within the possession specifically of Mr. Jansheski and
7 Mr. Fox. And we would like to take their depositions as well
8 by the end of November. We are told that they're in Tennessee
9 and it would be efficient to do both of them in the same trip.

10 THE COURT: Who wants to be heard first?

11 MR. SHALEK: Jim Shalek of Proskauer Rose for the
12 defendant DenTek.

13 Your Honor, the time for a preliminary injunction
14 application for expedited discovery of any purported
15 misappropriation has long since past. The plaintiff has known
16 about Duane's involvement with DenTek since January by their
17 own admission. That was ten months ago, August 3rd. They've
18 known of Kaplan's involvement with DenTek since at least as
19 early as May and, at the July hearing, raised many of the same
20 allegations they're raising now. So the preliminary injunction
21 presents factual allegations that they have had in hand for
22 many, many months.

23 There's no showing of any change in market condition
24 or other circumstances that indicate any immediacy or
25 irreparable harm. In fact, the preliminary injunction papers

1 are remarkably bare in that regard. The only discussion of the
2 market is Wal-Mart, which is really what this case is largely
3 about. And the Schrank deposition declaration, Exhibit F,
4 shows that the plaintiff lost market share at Wal-Mart about
5 six months ago, and that the situation has not changed, other
6 than that they seem to have regained a little of their market
7 share back last month. So there's no immediacy. There's no
8 irreparable harm.

9 Medtech moved for preliminary injunction in this case.
10 We had a very accelerated schedule that was quite costly, and
11 they simply didn't move forward on what they asked to move
12 forward on with great urgency, the patents and the trademarks.
13 And we believe they waived their right to move for preliminary
14 injunction on misappropriation last May. They knew about
15 Kaplan. They knew about Duane. They moved for preliminary
16 injunction. They didn't move on those subjects.

17 And, you know, this idea of expedited discovery, your
18 Honor, we served document requests in June, got a written
19 response in July, and we have yet to receive a single document
20 from them in response to our discovery. So the notion that
21 they move for preliminary injunction, they accelerate
22 everything on a couple of issues that they don't go forward
23 with, and then, when that doesn't pan out, they move for a
24 preliminary injunction on something else that they knew about
25 for months and months, without producing any discovery

1 themselves, is really very inappropriate.

2 And, in short, on the need for emergency relief,
3 Medtech has cried wolf once, and it's once too often. Relative
4 to the claim that there have been some trade secrets
5 misappropriated here, the threshold issue of any trade-secret
6 action is the existence of a trade secret. And when they moved
7 to amend their complaint, we asked what the trade secrets were,
8 and Mr. Ramage couldn't identify them. That was in -- back in
9 July.

10 And the Court permitted them to move forward with some
11 discovery, feeling that it was closely enough related to the
12 patents and trademarks to try and make their case. And they
13 have taken some depositions. They've moved forward over many
14 months. And the net result is that they are unable to show any
15 trade secrets which have, in fact, been used by the defendants.
16 And if we take a look at their allegations of what trade
17 secrets there are, they don't really identify any.

18 For example, Mr. Duane, in his answer, was remarkably
19 direct, as only a pro se defendant can be, and he points out
20 that the heart of this dispute is that DenTek has taken a chunk
21 of Wal-Mart business from the plaintiff Medtech. And what
22 Medtech claims is that Wal-Mart wanted the plaintiff to move
23 from multiple sizes to a one-size-fits-all to cut down
24 Wal-Mart's inventory and cost, and the plaintiff Medtech
25 refused, and that this decision, this bad business decision to

1 thumb one's nose at one's largest client, is somehow a
2 proprietary trade secret that Kaplan or Duane conveyed to the
3 defendant DenTek when the actual facts are that DenTek spoke to
4 Wal-Mart long before they ever talked to Kaplan or Duane.
5 Wal-Mart told DenTek that Medtech had refused to supply the
6 one-size-fits-all and asked DenTek if it could supply it.

7 So this purported trade secret that lies at the heart
8 of this, that was supposedly conveyed to us by Kaplan or Duane,
9 simply can't possibly be so. It's not a trade secret because
10 Wal-Mart told it to DenTek, and it certainly wasn't conveyed by
11 any former employee. This had happened long before DenTek ever
12 had anything to do with them.

13 And if we take a look at the remaining purported trade
14 secrets they identify on page six of their brief -- there's a
15 list of them here -- they identify a molder, Stelray Plastics,
16 who haven't been used by Medtech as an injection molder for
17 five years, when DenTek contacted them. And they're well known
18 in the injection molding world. We ran some searches on
19 Google. I put in dental components or injection molding and
20 plastics. Google tells you to go to something called
21 ThomasNet. And then you stick in the same terms, and they show
22 up in the top 20. So it's not exactly hard to find them.

23 They identify another consultant who supposedly is a
24 trade secret of some fashion, Frank Lesniak. Now, he's
25 identified as one of the two inventors in the patent this Court

1 construed, which discloses how to fabricate the Nightguard, and
2 that patent issued in 2004, years before we got into the
3 business. So it's impossible for his identity to be a trade
4 secret when it's right there on the face of their patent.
5 Furthermore, I'm not aware of my client having anything to do
6 with him.

7 They identify the three Tufts doctors who DenTek used
8 as a consultant. Those doctors are world-renowned experts.
9 They pop up amongst -- at the very top of the list if you punch
10 in the Google, any of the terms that you would punch in in
11 association with this.

12 They identify a law firm, Natter & Natter, who my
13 client pointed to me they've never used.

14 They identify an outfit, AGI Klearfold, which supplies
15 packaging. Now, the packaging -- DenTek is not even alleged to
16 use the same packaging company here that Medtech does for
17 Medtech Nightguard. Apparently, Medtech uses AGI for something
18 else and we happen to use it for our product. But this is a
19 part of Lesvaco. And when I went and looked on the Internet,
20 this is the largest media packaging company in the world. If
21 you simply go to their website, they say we are the world's
22 largest supplier of media packaging, the number one U.S.
23 supplier of hardening carts, holding carts. It's the second
24 largest U.S. supplier of packaging of cosmetics. And then they
25 go on to talk about how they've got 34 plants in nine

1 countries. So this isn't a trade secret. This is a well-known
2 supplier of packaging. We found in their annual report that
3 they talk about some of their manufacturing suppliers.

4 So, in terms of trade secrets, your Honor, there is
5 simply nothing here. And before they can take any discovery,
6 they need to show, as a threshold issue, that they have some
7 trade secrets. And it's our intent, when we respond to the
8 complaint, to file a motion for a protective order to require
9 them to identify what trade secrets they actually have, can
10 establish to be trade secrets, and have some colorable basis
11 for alleging we used before they're entitled to take broad
12 discovery, raw discovery, or rummaging through our files. They
13 were given leave to do that with Duane and a couple of others.
14 They had their chance. And I think it's appropriate that, at
15 this point, we really see if there's anything there before we
16 launch off to expensive discovery and a preliminary injunction
17 hearing when there's no colorable trade secret and certainly no
18 immediacy or need for immediate relief.

19 I'll also note, your Honor, that Mr. Duane is a
20 defendant in this, and he's not represented here today. I
21 don't know whether he was given notice, but he is apparently
22 defending himself pro se.

23 THE COURT: In fact, let me just note this has been --
24 let me make sure I'm right. This has been an electronic filing
25 case. It will no longer be an electronic filing case with a

1 THE COURT: What's the irreparable harm?

2 MR. RAMAGE: The irreparable harm here, your Honor, is
3 the irreparable harm that is always inherent with the use of
4 trade secrets and continuing use of trade secrets. We have
5 information to believe that DenTek is continuing to work on
6 some additional products and additional use of that additional
7 information with regard to some future plans of theirs that was
8 identified by the Tufts doctors. Kelly Kaplan is identified as
9 being at several of those meetings. They refused to disclose
10 what was actually discussed at those meetings. And that would,
11 of course, lead to the irreparable harm with whatever they're
12 doing with regard to that.

13 In addition, Mr. Duane, who himself is in violation of
14 his covenant not to compete, which had a period of two years,
15 we are entitled -- certainly entitled to have that covenant not
16 to compete enforced for the duration of that time period.

17 THE COURT: Mr. Ramage, I'm still not clear what
18 you're alleging the trade secrets are and what you're alleging
19 is the irreparable harm. That maybe they've been talking about
20 something that maybe they'll be using again, that doesn't sound
21 like irreparable harm to me.

22 MR. RAMAGE: Just a second, please.

23 THE COURT: Sure.

24 (Pause)

25 MR. RAMAGE: Your Honor, the key principal harm that

1 all due respect, they keep stumbling around month after month
2 trying to figure out a way to save the claim.

3 This case started as an intellectual property case.
4 This misappropriation stuff is a sideshow, and it's designed to
5 put pressure, I assume, on DenTek and also on my client. But
6 there's nothing there. And before everybody has to embark on
7 expensive disclosure and expensive motion practice, they really
8 ought to have to say what it is they mean in detail, subject to
9 examination and dismissal.

10 THE COURT: Anything else, Mr. Ramage?

11 MR. RAMAGE: I just want to point out that I was at
12 that initial hearing that Mr. Falco said that he read the
13 transcript. I've read the transcript. I remember. In fact,
14 it is clear in the transcript that I mentioned the need to take
15 the deposition of Kelly Kaplan early on. I trust that your
16 Honor does remember that or could review the transcript if you
17 need to refresh your recollection. And in fact, taking the
18 deposition of Kelly Kaplan was one of the primary focuses of
19 this summer, attempting to do that. She has been twisting and
20 wriggling to try to avoid having her deposition taken. That
21 just makes me even more likely to conclude that there is some
22 information that she really doesn't want us to know about.

23 Thank you.

24 THE COURT: I'm not sure that suspicion and surmise is
25 enough to allow you to go forward. I'm also not sure that an

1 assertion that there are about to be or there may be or there
2 might be new products coming out from DenTek that maybe will
3 compete with some of Medtech's products is a basis for going
4 forward, either, where I'm hearing nothing terribly distinct.

5 Mr. Shalek, you were poised to say something.

6 MR. SHALEK: Your Honor, I was simply going to make
7 the point that if, ultimately, Ms. Kaplan is deposed, there's a
8 difference between doing everything on an expedited basis. And
9 to be blunt, we feel that, to some extent, this litigation is
10 being used as an anticompetitive tool. We run around, we hurry
11 up on one count. That doesn't work out. I'll add another
12 count, another count with a lot of nebulous and vague
13 assertions, and hurry up and give us everything on 30 days.
14 It's very expensive. And there's a reason that things are done
15 in an orderly process in litigation. And I was simply going to
16 make the point that it does matter, and it matters a great deal
17 how discovery proceeds forward, even if it ultimately does go
18 forward.

19 THE COURT: I think I want to take five minutes to
20 think about this before doing anything. We'll reconvene in
21 just five minutes.

22 (Recess)

23 THE DEPUTY CLERK: Your Honor, we're back on the
24 record.

25 THE COURT: Well, I think I must agree with Mr. Shalek